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No. 02-679

IN THE

Supreme Court of the United States

DESERT PALACE, INC., dba
CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 65 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief *amicus curiae* in support of Respondent with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. The burden of proof question in this case is directly addressed by two interrelated 1991 amendments to Title VII that were enacted in reaction to this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The first of these amendments provides that

> "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a* motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added).

And, the second goes on to provide that in a case where the plaintiff has "prove[n] a violation under section 2000e-2(m)," the employer has a limited affirmative defense to the remedies of reinstatement and backpay if the employer "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B).

The 1991 amendments define the operative term "demonstrates"—which describes both what is required of the plaintiff to prove a § 2000e-2(m) gender discrimination violation and what is required of the defendant to perfect a § 2000e-5(g)(2)(B) reinstatement/backpay defense—as "meets the burdens of production and persuasion." 42 U.S.C. § 2000e(m).

Since § 2000e-2(m) and § 2000e-5(g)(2)(B) have a parallel structure and share in common the single operative term "demonstrates," that term must impose the same burden of proof on § 2000e-2(m) employee-plaintiffs and on § 2000e-5(g)(2)(B) employer-defendants, rather than imposing some qualitatively different or higher burden on one than on the other. And, by reason of the conventional litigation rules, which apply in Title VII cases as in civil cases generally, the

parties "meet[] the burdens of production and persuasion," in the ordinary contemporary meanings of those words, by proving their case through a preponderance of the evidence, both direct or circumstantial. *Infra*, pp. 4-10.

II. The Petitioner's argument is that a Title VII plaintiff can establish a violation under § 2000e-2(m) only by meeting a higher standard of proof of discriminatory motive that requires the plaintiff to present "direct evidence" consisting of "statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision." Pet. Br. 41. The Petitioner makes no attempt to do the impossible and square this heightened burden of proof requirement with the statutory language of the 1991 amendments. Instead, the Petitioner relies entirely upon Justice O'Connor's *Price Waterhouse* concurring opinion, which the Petitioner reads as contemplating the heightened burden of proof the Petitioner advocates.

There are three flaws in the Petitioner's argument. First, Congress in the post-*Price Waterhouse* 1991 amendments clearly embraced the conventional burden of proof rule that both a § 2000e-2(m) plaintiff and a § 2000e-5(g)(2)(B) defendant can prove their case by a preponderance of the direct or circumstantial evidence. Second, the fair reading of Justice O'Connor's opinion is that by using the term "direct evidence" she did *not* mean to endorse the higher "direct evidence" burden of proof requirement the Petitioner side attributes to her opinion. Third, the Petitioner side's higher "direct evidence" requirement is unsound in its own terms and, on that ground, should not be read into Justice O'Connor's *Price Waterhouse* concurring opinion and, by that route, into the Title VII law. *Infra*, pp. 10-20.

ARGUMENT

I. The Title VII[2] "burden of proof" question presented by this gender discrimination case is framed by the District Court's jury instructions and the petitioner-defendant Caesars Palace Hotel's objections to those instructions.

As we show, Congress has explicitly spoken to this question in Title VII's statutory language and has done so in terms that make it plain that the District Court's instructions correctly state the law.

A. The District Court began the jury instructions relevant here as follows:

> "The plaintiff [Catharina Costa] has the burden of proving each of the following by a preponderance of the evidence:
>
> 1. Costa suffered adverse work conditions; and
>
> 2. Costa's gender was a motivating factor in any such work conditions imposed upon her.
>
> "If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant." Pet. App. 32a-33a.

The district court then went on to further instruct the jury as follows:

> "You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's

[2] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.

> treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> "However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision." Pet. App. 33a-34a.

Caesars Palace maintains that the District Court's second set of "burden of proof" instructions were erroneous because such instructions are proper only in those cases in which a gender discrimination plaintiff presents "direct evidence" consisting of "statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision,"[3]—or in the Government's formulation, "non-inferential evidence or evidence that on its face established the discriminatory motive"[4]—and Costa presented no such evidence.

B. Caesars Palace and its *amici curiae* speak at length of many things but barely mention and resolutely refrain from analyzing Title VII's language. That is not the proper way to proceed in any statutory case. "The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). And, it is particularly improper here, since Title VII speaks with unusual clarity to the particular dispute in this case.

[3] Pet. Br. 41 (citation and inserted enumeration omitted).

[4] Brief for the United States as *Amicus Curiae* Supporting Petitioner ("Gov. Br.") p. 28.

At the most basic level, Title VII makes it "an unlawful employment practice for an employer" to

> "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

In their turn, Title VII's basic remedial provisions go on to state that

> "[i]f the court finds that [an employer] has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . ., the court may enjoin the [employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer . . . responsible for the unlawful employment practice)." 42 U.S.C. § 2000e-5(g)(1).[5]

In 1991, and in response to the "mixed motive" issue exposed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Congress amended the substantive provisions of Title VII to address the precise issue presented by this case. In this regard, the 1991 amendments provide that

> "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a* motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added).

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[5] While this case involves a Title VII claim against a defendant employer, that statute also prohibits discrimination by labor organizations. 42 U.S.C. § 2000e-2(c). Everything we say here about the burden of proof applies as well to Title VII claims brought against defendant unions.

The House Report on the 1991 amendments explains that this provision "overrules one aspect of the Supreme Court's decision in *Price Waterhouse*," by "clarify[ing]" that, once "the complaining party [has] demonstrate[d] that discrimination was a 'contributing' factor in an employment decision[,] . . . proof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine not liability for discriminatory employment practices, but only the appropriate *remedy*." H.R. Rep. No. 40, 102d Cong., 1st Sess., Pt. 1, p. 48 (1991) (emphasis in original).

That being so, the 1991 amendments go on to provide that in a case where the plaintiff has "prove[n] a violation under section 2000e-2(m)," the employer has a limited affirmative defense that goes *not* to liability *vel non* but to the remedies of reinstatement and backpay. 42 U.S.C. § 2000e-5(g)(2)(B).[6] To perfect that defense, the employer must "demonstrate[] that [the employer] would have taken the same action in the absence of the impermissible motivating factor." *Id.*[7]

Of particular relevance here, the 1991 amendments define the operative term "demonstrates"—which describes both what is required of the plaintiff to prove her § 2000e-2(m) gender discrimination case and what is required of the defendant to perfect a § 2000e-5(g)(2)(B) reinstatement/backpay defense—as "meets the burdens of production and persuasion." 42 U.S.C. § 2000e(m).

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[6] Section 2000e-2(m) was added by § 107(a) of the 1991 Act, and § 2000e-5(g)(2)(B) was added by § 107(b) of the 1991 Act. 105 Stat. at 1075-77. P.L. 102-166 § 107, 105 Stat. 1071, 1075-77 (Nov. 21, 1991).

[7] Even where the employer makes that showing, the court is authorized to "grant declaratory relief" and "injunctive relief" (other than reinstatement) and to award the successful plaintiff "attorney's fees and costs." 42 U.S.C. § 2000e-5(g)(2)(B)(i).

Since § 2000e-2(m) and § 2000e-5(g)(2)(B) have a parallel structure and share in common the single operative term "demonstrates," that term must impose the same burden of proof on § 2000e-2(m) employee-plaintiffs and on § 2000e-5(g)(2)(B) employer-defendants, rather than some qualitatively different or higher burden on one than on the other. *See Commissioner v. Lundy*, 516 U.S. 235, 250 (1996)("The interrelationship and close proximity of these provisions of the statute 'presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'").

It is therefore very much to the point that under the "[c]onventional rules of civil litigation [which] generally apply in Title VII cases," the parties meet the burdens of production and persuasion by "prov[ing] their case by a preponderance of the evidence." *Price Waterhouse*, 490 U.S. at 253. Not surprisingly then, the House Report on the 1991 amendments confirms, for example, that under § 2000e-5(g)(2)(B), "the employer's burden is to establish 'by a preponderance of the evidence' rather than 'clear and convincing evidence' that it would have made the same decision in the absence of discrimination." H.R. Rep. No. 40, Pt. 1, p. 45 n. 39, quoting *Price Waterhouse*, 490 U.S. at 258.[8]

The "preponderance of the evidence" standard, of course, requires "[t]he trier of fact [to] consider *all* the evidence, giving it *whatever weight and credence it deserves,*" in order to determine whether the plaintiff has made out a case and also whether a defendant has made out an affirmative defense. *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 771, 714 n. 3 (1983) (emphasis added). Thus, that standard

[8] *See* H.R. Rep. No. 40, Pt. 1, p. 48 ("[W]here the employer establishes that it would have taken the same action in the absence of any discrimination, a court may not order the employer to hire, reinstate, promote or provide back pay to the complainant.").

rests on – indeed, incorporates—the conventional rule of civil litigation providing that, "[a]s in any lawsuit, the [Title VII] plaintiff may prove his case by direct or circumstantial evidence." *Id.* "[D]irect evidence of a fact is not required" of a party precisely because "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence," *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960), and thus may be of equal or greater utility to the trier of fact. Indeed, in addressing "the kind and amount of evidence necessary to sustain a jury's verdict that an employer unlawfully discriminated," this Court observed that "circumstantial evidence [may be] probative of intentional discrimination" and "may be quite persuasive" in that regard. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 137 & 147 (2000).

Against this background, what follows directly from the statutory definition of the term "demonstrates"—giving the definition's words "meets the burdens of production and persuasion" their "ordinary, contemporary, common meaning"[9]—is this:

> • A Title VII gender discrimination plaintiff, like plaintiffs generally, establishes a § 2000e-2(m) unlawful employment practice by proving that "sex . . . was a motivating factor for [an adverse] employment practice" through "direct or circumstantial evidence" that "[t]he trier of fact [after] consider[ing] all the evidence," *Aikens*, 460 U.S. at 714 n. 3, finds to be a preponderance of that evidence; and
>
> • The defendant employer in such a case, like defendants generally, perfects his § 2000e-5(g)(2)(B) defense by proving that the employer "would have taken the same action in the absence of an impermissible motivating factor" through direct or circumstantial evidence

[9] *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207 (1997) (internal quotation marks and citations omitted).

> that the trier of fact after considering all the evidence finds to be a preponderance of that evidence.

The 1991 amendments do not contemplate—and do not leave any room for—the imposition of any heightened burden of proof of the kind advocated by the Petitioner and its *amici curiae* on either the plaintiff or the defendant in a § 2000e-2(m)/§2000e-5(g)(2)(B) discrimination case.

II. Against the forgoing, the Petitioner and its *amici curiae* base their higher "direct evidence" burden of proof requirement—that a § 2000e-2(m) plaintiff can only prove that "sex . . . was a motivating factor for an [adverse] employment practice" through "statements by a decision-maker that directly reflect the alleged animus and bear on the contested employment decision," Pet. Br. 41, or, put in more general terms, through "non-inferential evidence or evidence that on its face establishes the discriminatory motive," Gov. Br. 28—on Justice O'Connor's *Price Waterhouse* concurring opinion.

In that opinion, Justice O'Connor endorsed *Price Waterhouse*'s holding "that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." 490 U.S. at 258. Justice O'Connor added, however, that "in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." *Id.* at 276.

The Petitioner side's reliance—and embellishment—on Justice O'Connor's "direct evidence" reference is trebly flawed.

First, and we submit dispositively, Congress in the post-*Price Waterhouse* 1991 amendments clearly embraced the

conventional burden of proof rule that both a § 2000e-2(m) plaintiff and a § 2000e-5(g)(2)(B) defendant can prove their case by a preponderance of the direct or circumstantial evidence. *See* pp. 4-10, *supra*.

Second—leaving aside the relevant statutory provisions and their meaning—Justice O'Connor did not state in terms what she meant by the phrase "direct evidence," and we believe that the fair reading of her opinion is that she did *not* mean the higher "direct evidence" burden of proof requirement the Petitioner side attributes to her opinion.

Third, and closely related to the second point, the Petitioner side's higher "direct evidence" requirement is unsound in its own terms and that requirement should not, on that ground, be read into Justice O'Connor's *Price Waterhouse* concurring opinion and, by that route, into the Title VII law.

In addressing the latter two points, we cannot improve on Judge Tjoflat's comprehensive and fully reasoned opinion in *Wright v. Southland Corp.*, 187 F.3d 1287, 1288 (11th Cir. 1999), which analyzes the question "What constitutes 'direct evidence' of employment discrimination?" The pages that follow are therefore devoted to setting out the pertinent portions of his opinion to allow Judge Tjoflat's analysis to speak for itself.

(a) After reviewing the "means by which a plaintiff can prove impermissible [employment] discrimination," 187 F.3d at 1289, and "the well-established meaning [of 'direct evidence'] in the law of evidence," *id.* at 1293, Judge Tjoflat draws this lesson:

> "We are . . . presented with two possible definitions of 'direct evidence' in the law of employment discrimination. The first is the one that follows logically from the structure of employment discrimination law—namely, evidence from which a reasonable factfinder could find, by a preponderance of the evidence, a causal link

between an adverse employment action and a protected personal characteristic. We will refer to this definition as the 'preponderance' definition. The second is the traditional definition from the law of evidence—namely, evidence that, if believed, proves the existence of a fact in issue without inference or presumption. We will refer to this definition as the 'dictionary' definition." 187 F.3d at 1294.

Judge Tjoflat states the basis for the "preponderance" definition of "direct evidence" in the "structure of employment discrimination law," 187 F.3d at 1294, after this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972), as follows:

> "[A] plaintiff in an employment discrimination suit may proceed by one of two means: (1) *McDonnell Douglas*, or (2) direct evidence. [T]he *McDonnell Douglas* presumption is merely an evidence-producing mechanism that can aid the plaintiff in his ultimate task of proving illegal discrimination by a preponderance of the evidence. Consequently, if 'direct evidence' is the alternative to using *McDonnell Douglas*, the term would seem necessarily to mean evidence sufficient to prove, without benefit of the *McDonnell Douglas* presumption, that the defendant's decision was more probably than not based on illegal discrimination." 187 F.3d at 1293 (footnote omitted).

And, to put the discussion of the proper definition of "direct evidence" into sharper focus, Judge Tjoflat later clarifies what would constitute "direct evidence" of discrimination under the dictionary definition of that term:

> "Illegal discrimination means that the adverse employment action of which the plaintiff complains was based (at least in part) on an impermissible criterion, such as race, sex, or age. Thus, relevant evidence for proving illegal discrimination is evidence that demonstrates the state of mind of the employer (or, more concretely, the decisionmaker) at the time of the employment decision. The only 'eyewitness' to the state of mind of the decisionmaker is the decisionmaker himself. Consequently, the only direct evidence of illegal discrimination under the dictionary definition would be testimony from the decisionmaker that he took an adverse employment action against the plaintiff on the basis of a protected personal characteristic." 187 F.3d at 1294-95.

(b) In the end, Judge Tjoflat concludes:

> "The idea of 'direct evidence' has been a source of great confusion in employment discrimination law. After examining the cases on the topic and the legal framework within which the term is used, it is clear that direct evidence can mean nothing other than evidence from which a trier of fact could conclude, more probably than not, that the defendant discriminated against the plaintiff in regard to the contested employment decision on the basis of a protected personal characteristic." *Id.* at 1306.

And, in the heart of his *Wright v. Southland Corp.* opinion, Judge Tjoflat sets out the reasoned basis for that conclusion, which he summarizes as follows:

> "[T]he preponderance definition of direct evidence is supported by the intent of Congress in enacting anti-discrimination laws and the intent of the Supreme Court in creating the *McDonnell Douglas* presumption. In addition, the preponderance definition—unlike the dictionary definition—does not contravene the general evidentiary rule in federal courts that circumstantial and direct evidence are to be treated alike. Finally, the preponderance definition of direct evidence fits better than the dictionary definition with other principles of employment discrimination law." 187 F.3d at 1300.

Judge Tjoflat then proceeds by elaborating each of those points, and by noting that, on his reading, Justice O'Connor's

Price Waterhouse concurring opinion contemplates the preponderance definition and not the dictionary definition of "direct evidence."

(c) Given the posture of this case—and the Petitioner side's insistence that Justice O'Connor's *Price Waterhouse* concurring opinion contemplated the dictionary definition—we reverse Judge Tjoflat's order of presentation and turn first to his discussion of Justice O'Connor's opinion and then to his discussion of the points that call for a preponderance definition of "direct evidence." In the first of these regards Judge Tjoflat has the following to say:

> "[I]n *Price Waterhouse,* Justice O'Connor's concurrence relied upon a preponderance definition of direct evidence. The concurrence stated that the affirmative defense that the same decision would have been made in the absence of discrimination becomes relevant when the plaintiff has 'shown by direct evidence that an illegitimate criterion was a substantial factor in the decision.' *Price Waterhouse,* 490 U.S. at 276 (O'Connor, J., concurring in the judgment). Justice O'Connor goes on to define 'direct evidence' as 'evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made "because of" the plaintiff's protected status.' *Id.* at 278 (O'Connor, J., concurring in the judgment). This is obviously not the dictionary definition of direct evidence: Justice O'Connor explicitly states that the trier of fact is expected to 'draw an inference' of discrimination. Instead, Justice O'Connor's definition states that a plaintiff has presented direct evidence when a trier of fact could reasonably conclude that the contested employment action was caused by discrimination—essentially, a restatement of the preponderance definition of direct evidence." 187 F.3d at 1303 n. 18.

Simply stated, Judge Tjoflat's reading of Justice O'Connor's *Price Waterhouse* concurring opinion completely undermines the position of the Petitioner side, which rests entirely on the opposite reading of that opinion, and provides a more than sufficient basis for upholding the District Court's jury instructions here and for rejecting the Petitioner's objections to those instructions.

(d) Be the forgoing as it may, even putting Judge Tjoflat's reading of Justice O'Connor's *Price Waterhouse* concurring opinion to the side, his three part argument for an employment discrimination law "preponderance" definition of "direct evidence" over their higher "dictionary" definition calls for the preponderance definition.

(i) Judge Tjoflat begins by considering "the intent of Congress in enacting anti-discrimination laws and the intent of the Supreme Court in creating the *McDonnell Douglas* presumption":

> "[I]t is possible for an employer to discriminate on the basis of a protected personal characteristic in a manner that does not allow the victim of the discrimination to establish the *McDonnell Douglas* presumption. *** If direct evidence were to mean only evidence that proves discrimination without presumption or inference, then we would have created a system in which a plaintiff would be denied the opportunity to recover for employment discrimination despite the fact that he could prove such discrimination by a preponderance of the (circumstantial) evidence.
>
> "The significance of this is two-fold. First, such a system would surely frustrate congressional intent. The purpose of employment discrimination law—as is clear from the plain language of the relevant statutes—is to prevent employment decisions based on certain protected personal characteristics. When such a decision

can be proven by a preponderance of the evidence, but the plaintiff nevertheless loses, congressional intent has been frustrated.

"Second, such a system would frustrate the purpose of *McDonnell Douglas*. *** If we were . . . to use the dictionary definition of direct evidence, we would, in some instances, be making the plaintiff's task more difficult than it would have been in the absence of *McDonnell Douglas*—namely, in the situation in which the plaintiff can prove discrimination by a preponderance of the (circumstantial) evidence, but cannot satisfy the requirements needed to establish the *McDonnell Douglas* presumption. *McDonnell Douglas* would thereby be turned on its head; a presumption that was designed to help plaintiffs would be the basis for a system that makes a plaintiff's task more difficult." 187 F.3d at 1300-01.

(ii) Judge Tjoflat then discusses the proper fit between an employment discrimination law "direct evidence" rule and the general federal rules of evidence:

"The Supreme Court has stated that courts should not 'treat discrimination differently from other ultimate questions of fact.' *Aikens*, 460 U.S. at 716. If we were to require non-circumstantial evidence to prove that a protected personal characteristic was the basis of an employment decision, we would be treating this factual question very differently from other ultimate questions of fact. As a general rule in the federal courts, direct and circumstantial evidence are not distinguished; all relevant evidence is to be considered in deciding a case. *Cf. Holland v. United States*, 348 U.S. 121, 139-40 (1954) (stating that, in criminal cases, circumstantial evidence is 'intrinsically no different from testimonial evidence'). This is true, for instance, in equal protection jurisprudence; determining whether a given state action was motivated by a discriminatory purpose requires an 'inquiry into such circumstantial and direct evidence of

intent as may be available.' *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). There is no rational reason why employment discrimination law should be an exception to this general rule, and any definition of direct evidence other than the preponderance definition would carve out such an exception. *See Aikens*, 460 U.S. at 714 n. 3." 187 F.3d at 1301.

(iii) Judge Tjoflat concludes his discussion with a three part demonstration of why the "preponderance definition of direct evidence is also the only logical definition when considered in the light of other tenets of employment discrimination law." 187 F.3d at 1301. In the first place:

"[T]he traditional framework for deciding civil cases is still (even after *McDonnell Douglas*) the appropriate framework for deciding employment discrimination cases. As the Supreme Court has said, the central focus in an employment discrimination case 'is always whether the employer is treating some people less favorably than others because of' a protected personal characteristic, and the *McDonnell Douglas* presumption is only one method of pursuing this inquiry. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (internal quotation omitted). Use of the dictionary definition of direct evidence creates the possibility that a plaintiff may be excluded from the traditional framework altogether; if a plaintiff cannot establish the *McDonnell Douglas* presumption and cannot present a certain type of evidence, then he will have no opportunity to prove discrimination. The preponderance definition, in contrast, assures that the central inquiry in an employment discrimination suit always will be whether the employer has impermissibly discriminated; under the preponderance definition, even if the plaintiff cannot establish the *McDonnell Douglas* presumption, he will still have the opportunity to attempt to prove discrimination by a preponderance of the evidence." 187 F.3d at 1301-1302.

In addition, as Judge Tjoflat observes:

> "[T]he law is clear that . . .once the employer has done what would be required of it if the plaintiff properly invoked *McDonnell Douglas*, the *McDonnell Douglas* presumption is no longer relevant. Under the preponderance definition of direct evidence, this rule makes sense. *** [F]ailure to establish the *McDonnell Douglas* presumption, under the preponderance definition of direct evidence, means only that the case will be treated like any other civil case—in other words, the plaintiff must present evidence sufficient to prove illegal discrimination by a preponderance of the evidence (but without the benefit of a proffered explanation from the employer). Therefore, if the employer has volunteered a nondiscriminatory reason for the contested employment action, the distinction between a *McDonnell Douglas* case and a direct evidence case breaks down, and the question of whether the plaintiff successfully established the *McDonnell Douglas* presumption becomes irrelevant. In contrast, under a dictionary definition of direct evidence, the rule that the *McDonnell Douglas* presumption becomes irrelevant once a legitimate, nondiscriminatory reason is volunteered by the employer is senseless. Under the dictionary definition, failure to establish the *McDonnell Douglas* presumption means that the plaintiff must prove improper discrimination without the benefit of any inferences by the trier of fact. *** This need for a separate inquiry [into whether the plaintiff had established the *McDonnell Douglas* presumption] simply does not fit with the rule that if the employer has articulated a legitimate, nondiscriminatory reason for the adverse employment action, it is irrelevant whether the plaintiff has properly established the elements needed to invoke the *McDonnell Douglas* presumption." *Id.* at 1302.

And, finally, as Judge Tjoflat states:

> "[T]he preponderance definition is consistent with the rule that if a plaintiff can prove improper discrimination

> by direct evidence, the defendant can nevertheless prevail [on remedy issues] by showing that the same employment decision would have been made absent the discriminatory motive. In other words, the argument that the same decision would have been made apart from discrimination operates as an affirmative defense. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 246 (1989) (plurality opinion). An affirmative defense is generally a defense that, if established, requires judgment for the defendant even if the plaintiff can prove his case by a preponderance of the evidence. This understanding fits with the preponderance definition of direct evidence – if the plaintiff can prove discrimination by direct evidence (i.e., by a preponderance of the evidence), the defendant can nevertheless prevail if it can establish that it would have taken the same action in the absence of discrimination. In contrast, under the dictionary definition of direct evidence, the defendant's affirmative defense would come into play only when the plaintiff has presented a certain type of evidence, unlike any other affirmative defense known to the law." *Id.* at 1302-03 (citation & footnotes omitted).[10]

* * *

In sum, the term "direct evidence," as used in the "law of employment discrimination," means "evidence from which a reasonable factfinder could find, by a preponderance of the evidence, a causal link between an adverse employment action and a protected personal characteristic," 187 F.3d at 1294, with the clarification—to take into account the

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[10] For the reasons stated by Judge Tjoflat in the portion of his opinion quoted in text at pp. 17-19 above, the Government is mistaken in its assertion that the "settled case law defining the standards of proof and causation" in Title VII cases draws a rigid distinction between "*McDonnell Douglas* pretext cases, on the one hand, and . . . mixed-motive cases, on the other." Gov. Br. 21. That being so, the argument at Gov. Br. 19-21, that a "dictionary" definition of direct evidence is necessary in order to safeguard this distinction fails.

employment discrimination rule stated in *McDonnell Douglas*—that, as would be true in civil cases generally, such "evidence [must be] sufficient to prove [that link], without the benefit of the *McDonnell Douglas* presumption," *id.* at 1293.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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